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Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 147

SANTA FE PRESCOTT AND PHOENIX RAILWAY COMPANY, A CORPORATION,
and
NATIONAL SURETY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, A CORPORATION,
Defendant in Error.

REPLY BRIEF.

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WORTHCOTT-WARREN PRINTING COMPANY, OMAHA.

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REPLY BRIEF.

Under the construction contract the parties were not dealing with each other merely in the relation of common carrier and shipper.

Much space is devoted by our opponents to a narrow application of Hutchinson's test as to whether or not a carrier assumes the duties or responsibilities of a common carrier. The present case does not fall even within the definition or test quoted. Under the construction agreement the Railway Company was to haul the construction outfit, including the

laborers, to and from the points of construction as the same progressed, a large part of that service being necessarily over a line or road not established or opened for general business.

It is safe, however, to say that the mind of man is not capable of formulating any general rule to which exceptions may not be found because of cases not falling within the reason for the rule. Hutchinson's definition w[illegible] deduced or based upon cases in which the parties were acting solely in the relation of common carrier and shipper. Our quotation from Elliott on Railroads is more pertinent. As stated in our former brief, in respect to the construction contract, the Railway Company was acting in its private and not in its public capacity. It was contracting for the construction of a branch line, in which contract and in the furtherance thereof, it assumed to do a part of the work necessary to complete the object of the agreement, namely, the hauling of the necessary outfit, including laborers, to and from the point of construction as the same should progress. The fact that the contract specified that the Railway Company would perform its part, namely, the movement of the outfit, at a stated price, is neither controlling nor important in determining the relation of the parties or their respective capacities. That is shown by the general terms of the contract as that of independent contracting parties. In the end any sums specified on account of the part of the work done by the Railway Company in the furtherance of the contract would be deducted from the bid or contract price of the Construction Company. The Railway Company might have agreed to make no charge what-

ever for its part of the work. In that event no doubt the bid would have been reduced. The limited price it fixed for the movement of the outfit, and which would in the end be deducted from the bid or contract price, no doubt was intended to reflect the approximate cost or out of pocket expense to which the Railway Company would be put in making the movement, and by charging that up against the contractor so as to be necessarily embraced in his bid, that bid would more truly represent to the Railway Company the real cost to it of the construction of this branch line.

Of course the mere fact that less than the tariff rate was prescribed would not, if standing alone, be important in determining the capacities in which the parties were acting. If a railroad company, dealing with a shipper merely as such, should undertake to carry on its established line at less than the tariff rate that would not change the capacity in which it was acting. It would still be acting in its public capacity as a common carrier. In the case at bar, however, it was acting in its private capacity, contracting to secure the construction of a branch line and both parties were acting in the furtherance of a common object. The Construction Company obtained rights and benefits which it could not demand or expect to receive in the capacity of a shipper. It was used as an agency of the Railway Company in the furtherance of its work and the relation of the parties was in no respect different from that of a railway company and an express company under the usual express contract considered by this court in the *Voight* case. In the latter case the railway

company did not haul an express car of the express company. On the contrary it itself furnished the express car, hauled the same in its regular passenger train over its established route, and in that express car was carried the employes and the express freight of the express company.

The fact that the loss occurred at a point on the opened or established line of the Railway Company does not, of course, either alter the terms of the contract or change the relations of the parties as fixed and determined by the construction agreement.

The agreement to haul the laborers and outfit was not independent of and separable from the contract of construction as contended by our opponents. It was an inseparable and dependent part thereof.

If held as acting as a common carrier an agreement to give or receive a special rate would be violative of the Interstate Commerce Law.

Plaintiff's action is based upon the construction contract, a copy of which is attached to the complaint. If that contract is violative of the Interstate Commerce Law the parties thereto would be *in pari delicto*. Opponents only refer to Section 2 of the Interstate Commerce Law, but altogether ignore Section 6 thereof as well as Section 1 of the Elkins Act of 1903, upon which the ruling of this court, in *C. & A. Railroad* v. *Kirby*, 225 U. S., 155, cited by us, was based. We cannot assume the parties intended to violate this law and, therefore, must assume that they did not intend to deal with each other in the relation of common carrier and shipper.

Under the construction contract the railway company assumed "no obligation or risk in case of accident or damage to men and supplies."

It was plainly intended that the Railway Company should be at no risk of liability. The provision is found in the construction contract and in the supplementary letter. It was inserted by laymen and the court should give effect to the obvious intent.

Sexton v. *Kessler*, 225 U. S., 90.

The cases cited by opponent all arose under formal bills of lading or contracts of affreightment in which it plainly appeared the Railway Company was acting in its capacity as a public carrier. We contend such was not the case here and the agreement should, therefore, receive the natural construction the parties evidently intended.

In *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard, 344, cited by opponent, much stress is laid by Mr. Justice Nelson (see pages 382 and 383) upon the fact that the steamboat company acting in its capacity as a common carrier was seeking to relieve itself from an obligation which the law imposed upon it as such. Such contracts (bills of lading) are one sided and would in any event be construed to sustain their validity and would not be given a construction which would render the same invalid.

On page 22 of our brief we cite a number of authorities holding that a stipulation in a free pass, that the transportation is to be at the recipient's risk, includes those likely to be encountered through the negligence of the carrier's servants or otherwise.

In such cases the railway company was not acting as a common carrier.

Question of negligence not for the jury.

It is contended that the question of negligence under the evidence cannot be considered, inasmuch as the written motion for a directed verdict was based solely upon the pleadings and not upon the evidence. It is true such a written motion was presented at the close of plaintiff's case and fully argued, but at the close of all the evidence was merely formally presented. However, every point is preserved in objections to instructions given and assigned as errors. But a specific instruction for a directed verdict (see second assignment of errors) was submitted by defendant and refused, and as embraced in the same instruction defendant also made the following request which was refused:

> "The court instructs you that the plaintiff has failed to show that the defendant was guilty of any negligence in transporting and handling the property of plaintiff and that your verdict should be for the defendant."

The fourth assignment of errors also presents another instruction on this subject. The question was fully presented to the trial court. It is contended, however, that no exceptions were taken to the refusal to give these instructions. In the transcript of record (page 45) it appears that defendant requested the court to give instructions numbered 1, 2, 4 and 5, "which the court refused to give and duly marked 'refused,'" etc. An exception was not necessary under the practice in Arizona as the simple refusal to give the same is sufficient. See:

Revised Statutes of Arizona, 1901, page 450, as follows:

> "1409. (Sec. 200.) Either party may, before the charge is given, present to the court, in writing, such instructions as he desires to have given to the jury, and for this purpose a reasonable time therefor shall be given; the court shall pass on the same, and either give or refuse the same as asked; if given, the judge shall on the margin of each instruction, write the word 'given' in ink, and sign his name thereto in ink; and if refused, he shall, in like manner, write the word 'refused,' and sign his name thereto.
>
> 1410. (Sec. 201.) No further instructions shall be given to the jury after the argument begins. The charge of the court and all instructions asked by either party shall be filed with the clerk and shall constitute a part of the record, and *shall be regarded as excepted to and subject to revision for error, without the necessity of taking exceptions thereto.* The charge and instructions given by the judge may be used by the parties or their attorneys in the argument to the jury."

The point now made was of course not made in the Territorial Supreme Court for obvious reasons.

The evidence failed to show any likelihood or probability of danger from fires at the junction where the cars were left. It was shown to be the custom to leave cars of that character at such sidings. No previous fires were testified to. The engines of the Railway Company operating in that territory were oil burners. They would not throw sparks and if the fireman should neglect his firing valve so that oil might drop if there was any fire to the same it would go out when it struck the roadbed. (Tr., 41, 42.) The uncontradicted evidence was that the right of way at this place was clear

and free of combustible material. The fact that there was no habitation there would simply lessen any danger from fires. If these cars had been taken to the next station of Wickenburg, or even to Phoenix, and set out upon side tracks where there were habitations no night watchman would be set over them to watch or guard against fires because they would not be likely to arise.

It is contended that the jury "with special knowledge of local conditions," etc., determined the question of negligence, and further, that the Territorial Supreme Court "likewise having special knowledge of local conditions," etc., held that the submission of the question of negligence to the jury was proper. The Supreme Court of the territory does not refer to any peculiar local conditions, nor does the brief of our opponent, in the remotest manner, suggest any. While a jury may always use that general knowledge which they possess in common with mankind yet it has been a number of centuries since jurors were permitted to be qualified as witnesses. The question of negligence in any transitory action which need not be tried in the locality of the accident is to be determined by what is shown or produced in the way of evidence, so that either side may have the right to correct any false impressions, and not by what does not appear in the record.

There was no dispute as to the facts or circumstances. That was recognized by the trial court in instructing the jury (see 10th assignment of errors) using the following language: "For the circumstances surrounding this are practically admitted," and the court continued: "was the one act of the railroad company in leaving the cars on the side

track under the circumstances of the case negligent or was it not?"

In the case of *Marande* v. *Texas & Pacific Railway*, 184 U. S., 173, relied upon by opponents, the rule set out in our former brief on this subject was reiterated. In that case the court is at great pains to go into the evidence and show that there was not only a probability but a likelihood of the cotton in question being destroyed by fires from the locomotives, and also that the usual precautions taken at other places to prevent the communication of fire or its spread were not adopted. A large quantity of cotton was piled within a few feet of the railway tracks on which engines were frequently moving. It was shown that fire could easily be communicated to the cotton and would smolder for some time before breaking out; that no tarpaulins or other devices were used to protect the cotton against sparks emitted or cinders dropped, and that in view of the risk of fires being thus communicated from the railway engines proper guards were not placed to protect such inflammable commodity as were used in other places. The engines there used being coal burners were likely to emit sparks from the stack or to drop cinders from the ash pan. That case was entirely different from the one at bar. There there was every probability of fires being communicated from the engines and the cotton was of an inflammable nature. In the case at bar there was shown to be no such danger and no probability or likelihood of fire being communicated to the cars standing upon the side-tracks. There was no evidence even of evil disposed persons frequenting that neighborhood who would be likely to start such a fire.

In the case of *Milwaukee, etc., Railway* v. *Kellogg*, 94 U. S., 470, the simple question was whether the railway company should have anticipated that on account of a high wind prevailing a fire negligently set out by it would spread as far as it did and do the damage which was actually done. In that case it was held for the jury to determine whether the railway company having negligently set out the fire ought not to have anticipated that it was likely to spread as far as natural conditions would carry the same.

If we assume, therefore, that the Railway Company was acting as a common carrier, even then, in view of the contract, the burden was upon the plaintiff to show that the loss was caused by the Railway Company's negligence. It is not sufficient merely to show that there was some negligence in some respect to enable plaintiff to recover, but it would be necessary to show that the negligence claimed was actionable, that is to say, was the proximate cause of the loss. The court left it to the jury, without explanation, to determine whether leaving the car upon the sidetrack was the proximate cause of the loss. But the fire which caused the damage was not shown to be likely to occur at that place and the Railway Company was not bound to anticipate and provide against what might be remotely or slightly probable.

Respectfully submitted,

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